SUPREME COURT, U. S.

FILED

OCT 20 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITIONERS' REPLY MEMORANDUM

FRANCIS X. DRISCOLL
1501 N. Broadway
Walnut Creek, California 94596

SIEGFRIED HESSE
1630 San Pablo Avenue
Oakland, California 94612

Attorneys for Petitioners

ROBERT P. BRORBY
1630 San Pablo Avenue
Oakland, California 94612

CRAIG Z. RANDALL
1501 N. Broadway
Walnut Creek, California 94596

FRED C. DODGE

EDWARD O. REYES

JULIUS KAHN III

THOMAS J. TITMUS
1630 San Pablo Avenue
Oakland, California 94612

Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITIONERS' REPLY MEMORANDUM

Petitioners submit the following reply to the arguments first raised in the memorandum for the United States in opposition to the petition for a writ of certiorari.

1. The Government's reliance on the social security cases is ill founded and underscores the importance of granting a writ to resolve the important questions of law presented.

The Government does not deny that the petition raises important questions of law affecting the rights of all retired federal employees. Instead it requests that the writ be denied on the basis of a new argument which was not raised or considered by the court below.

Petitioners presented seven constitutional claims for resolution by the Court of Claims, each of which is dependent on the nature of their retired pay. (See Pet. 11, n. 11.) The court below rejected all of them on the ground of stare decisis, the sole ground of the Government's motion to dismiss. (See Pet. 7a; Defendant's [Opening] Brief 2.) That ground was demonstrably erroneous (See Petition for Rehearing 3)[1] and the Government's memorandum does not attempt to justify the decision below on that ground.[2]

The Government now contends that *Andrews v. United States,* 175 Ct. Cl. 561 (1966), is "consistent with this Court's holdings in *Nestor* and *Belcher.*" (MIO 3.)[3] The Government thus seeks to extend the social security cases to the military retirement system.

The Government's contention that retirement pay is analogous to social security benefits is not sound. The proper analogy is to private retirement plans. Social security payments are in the nature of welfare benefits. Those benefits are funded by payroll taxes from the active work force and *private* employers. There is

---

[1]The issues raised in petitioners' third through seventh causes of action were not raised or considered in *Andrews v. United States,* 175 Ct. Cl. 561 (1966). The same is true with respect to the issues raised in the first and second causes of action as they relate to enlisted personnel. (See Pet. 11 n.11.)

[2]The Government notes the basis of the court's ruling below, but only as it relates to petitioners' first and second causes of action. It makes no argument that the court below correctly applied the doctrine of stare decisis to the issues raised herein but not raised in *Andrews.* Memorandum In Opposition 2-3 (hereafter cited as MIO).

[3]*Flemming v. Nestor,* 363 U.S. 603 (1960); *Richardson v. Belcher,* 404 U.S. 78 (1971).

no employer-employee relationship between the recipient and the Government. The relationship is that of aged or dependent citizen and Government. The operative relationship between the United States and petitioners and all other retired federal employees is that of employer and employee. The consideration for petitioners' retirement pay is not only the contributions withheld from their salary, but also their career service to the United States and their concurrent forbearance from seeking civilian employment. *Dismuke v. United States,* 297 U.S. 167, 170 (1936). Moreover, the retirement contributions of federal officers and employees are not taxes. Otherwise the contributions of federal civil service employees would not be refunded when retirement benefits are denied. See, e.g., 5 U.S.C. §8316.[4]

The retroactive denial of social security benefits was upheld by this Court on the ground that there is no "accrued" property right to such benefits even though a recipient's taxes supported similar benefits for others in the past. *Flemming v. Nestor,* 363 U.S. 603 (1960).[5] Unlike social security recipients, peti-

---

[4]Petitioners seek a refund of their contributions if their recomputation rights are not restored. (See Pet. 11, n.11.)

[5]"The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the "general welfare," ' . . . whereby persons gainfully employed, and those who employ them, are *taxed* to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree

tioners seek the retirement rights they earned pursuant to the statutes in effect when their active service was performed. *Mississippi ex rel. Robertson v. Miller,* 276 U.S. 174, 179 (1928); *Bell v. United States,* 366 U.S. 393, 401 (1961). The crucial distinction is that social security benefits are *provided* by the Government on the basis of *need,* while retirement benefits are *earned* on the basis of *service.*

The effect of the application of *Nestor* and *Belcher* to petitioners would be that no public officer or employee of the United States has any vested right to his earned retirement benefits. At any time the Government could reduce or completely eliminate retired pay and repudiate its contractual obligations to its employees and officers.[6]

A private employer must provide his retired employees the promised retirement benefits or refund their contributions deducted from their wages in anticipation of those benefits. See *Chemical Workers*

---

to which he was called upon to support the system by *taxation.* It is apparent that the *noncontractual interest* of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments." (363 U.S. at 609-610, emphasis added.)

[6]The Government conceded below that petitioners' "retired pay is earned compensation and not a gratuity." (Defendant's Reply Brief 7.) Now it contends that such earned pay is not "property" entitled to constitutional protection, relying on *Richardson v. Belcher,* 404 U.S. 78, 81 (1971). (MIO 3.)

A soldier's earned pay is a property right which is protected by the federal constitution. (See Pet. 13, 18.) Thus, the Government's attempt to equate petitioners' retired pay to social security benefits is tantamount to a repudiation of its concession below which is a part of the certified record in this case.

v. Pittsburgh Glass Co., 404 U.S. 157, 181 n.20 (1971). Unless *Nestor* has overruled *Mississippi ex rel. Robertson v. Miller, supra, sub silentio,* the United States in its capacity as employer must provide petitioners' promised retirement benefits or refund their retirement contributions.

Certiorari was not sought in *Andrews* and this Court did not have the opportunity to review the nature of military retired pay. In view of the Government's expressed intent to extend the social security cases to federal retired pay it is of paramount importance that this Court determine the precise nature of federal retirement benefits.

2. Assuming the Government's reliance on the social security cases is well founded, petitioners are nevertheless entitled to the full benefit of their retirement contributions, and the Government's delay in asserting that defense will deprive them of that property right unless this Court grants the writ.

The Government now contends that petitioners' interest in their retirement pay is not "property" within the meaning of the due process clause. (MIO 2-3.) However, it does not dispute petitioners' statement of facts, which establishes that petitioners contributed substantially to the funding of their retired pay. (Pet. 5.)

Since petitioners' retirement contributions are not taxes, petitioners are entitled to the full benefit of those funds even if they have no retirement rights in light of *Nestor*. (See 1, *supra*.) The Government continues to argue (albeit for new reasons) that the nature of petitioners' retired pay is not relevant to

the issues raised by their claims.[7] This argument is unsound and the Government's reliance on the social security cases demonstrates that it is imperative that that issue be resolved now, wholly apart from the conflict of decisions already noted in the petition.

If petitioners' pay is for current standby duty, they have not received and will not receive any retirement pay. In that event, they are entitled to a full refund of their contributions, plus interest.

If their retired pay is deferred compensation for past services, petitioners are entitled to recover their contributions to the extent that those contributions, plus interest, exceed the net benefit they will receive under the present system, taking into account the income losses they have suffered and will suffer. (See Pet. 6-8.)

In either event, the Court of Claims should be directed to determine the amount of contributions to which each petitioner, and each member of the class petitioners represent, is entitled and to enter judgments accordingly.

The Government's new argument was not raised below, however. Assuming its validity, petitioners

---

[7]See MIO 3, n.1. The Government misstates that petitioners seek recognition of an earned right to "specific pay increases." They seek restoration of a specific and objective means of measurement and adjustment of their retired pay. The amount they will actually receive is unknown in advance. That is also true of the current system which adjusts retired pay in accordance with the Consumer Price Index. Both systems are equally certain as to how petitioners' pay will be determined, and equally uncertain as to the actual amount their pay will be at any particular time. This fact does not render such rights "speculative," however. Many enforceable contracts, such as grain future contracts, are "speculative" in that sense.

have no remedy unless this Court grants the writ and remands the case to the Court of Claims with appropriate directions. A simple denial of the petition will forever preclude petitioners from relief even though they would otherwise be entitled to a refund of their contributions in whole or in part.

CONCLUSION

The Government below successfully avoided resolution of the merits of petitioners' claims by reliance on stare decisis. It has abandoned that defense here, but asks this Court to deny petitioners all relief on the basis of new arguments which neither petitioners nor the court below have had the opportunity to consider on their merits.

Wherefore, petitioners request the Court to grant the writ, or remand the case with directions that the Court of Claims consider the petition below on its merits in light of the Government's new contentions.

Respectfully submitted,

FRANCIS X. DRISCOLL

SIEGFRIED HESSE

Attorneys for Petitioners.

ROBERT P. BRORBY

CRAIG Z. RANDALL

FRED C. DODGE

EDWARD O. REYES

JULIUS KAHN III

THOMAS J. TITMUS

Of Counsel.